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the trust estate; the two comparatively simple principal cases illustrate one method of attacking the problem, and indicate several of the difficulties which must necessarily arise in more complex states of fact.

S. A.

STATUTE OF FRAUDS—REAL ESTATE—DELIVERY OF THE MEMORANDUM—*Lowther v. Potter*¹ was a suit for the specific performance of a contract for the sale of certain real estate. The contract itself appears to have been oral, but two deeds were to be prepared for different portions of the premises, and were in fact made, but never delivered. The deeds did not contain a recital that they were made in pursuance of a previous contract. Defendant demurred to the bill on the ground that the contract was not in writing, and that there was no written memorandum or note thereof signed by the defendants or by their authorized agent, as required by law.² Plaintiff relied upon the undelivered deeds as a sufficient memorandum or note in writing of the contract to take the case out of the statute. The question therefore, in its last analysis is whether an undelivered deed is a sufficient note or memorandum of an oral contract for the sale of real estate to satisfy the statute of frauds. The Court held that under the circumstances of the case, the statute was not satisfied, and the demurrer was sustained.

There is considerable conflict of authority on the question whether an undelivered deed will satisfy the statute of frauds. In certain jurisdictions, there are definite decisions to the effect that "a deed drawn and executed with the knowledge of both parties with a view to the consummation of the contract of sale, which in itself, and of itself, embodies the substance, though not all the details or particulars of the contract, naming the parties, expressing the consideration, and describing the lands, though not delivered and its delivery postponed until the happening of a future event, is a note or memorandum of the contract sufficient to satisfy the words, the spirit, and the purpose of the statute of frauds."³ In the jurisdictions upholding this view, however, an undelivered deed is only regarded as meeting the requirements of the statute where it is in fact a note or memorandum of the contract, referring specifically to its terms and conditions. If the deed is silent as to the terms of the contract, in pursuance of which it is made, it is no evidence in writing of such contract.⁴

The weight of authority, however, appears to support the pro-

¹ 129 Fed. 196 (Ky., 1912).

² Kentucky statutes, Section 420. The Kentucky statute is substantially the same as the English Statute of Frauds.

³ *Jenkins v. Harrison*, 66 Ala. 345 (1880), affirmed in *Johnson v. Jones*, 85 Ala. 286 (1887); see also *Bowles v. Woodson*, 6 Grattan, 78 (Va., 1849), and *McGee v. Blankenship*, 95 N. C. 563, at p. 569 (1886).

⁴ *Kopp et al. v. Reiter et al.*, 146 Ill. 437 (1893).

position that an undelivered deed will not of itself constitute a memorandum of the contract which will satisfy the statute of frauds, whether or not the terms of the contract be recited in the deed. The case most frequently cited in support of this rule is *Parker v. Parker*.⁵ In that case, it was urged that if the instrument was not valid as a deed, it might be considered as a memorandum in writing, signed by the party agreeing to convey the real estate described, and thus authorize a decree in equity to make a conveyance. But the Court held that to make it operative as a memorandum, it must have been executed and delivered to the plaintiff or someone in his behalf. Although the alleged memorandum was in fact a *deed*, the statement is general: that *any note or memorandum* of an oral contract must have been delivered to satisfy the statute. So in *Comer v. Baldwin*,⁶ the Court held that "to render a written contract to convey land operative, it is just as essential that the contract or memorandum of the contract required by the statute of frauds be delivered, as that a deed be delivered in order to convey the title."

In any event, it seems clear that if the alleged note or memorandum be an *undelivered deed*, it is generally regarded as not sufficient to satisfy the statute, regardless of whether there be a recital of the contract in the deed or not.⁷ The argument is that an instrument intended by the parties to act as a deed, and not as a memorandum of a contract of sale, being inoperative for want of delivery as a deed should not be made to perform service as a memorandum.⁸

In the decision of the principal case, the Court distinguishes the memorandum or note of a contract for the sale of real estate from the contract itself. The contract, it is admitted must be delivered,⁹ but the Court intimates that the note or memorandum containing a recital of the terms of the contract need not be delivered.¹⁰ Applying this rule to the case of a deed, Judge Cochran says: "It seems to me that it follows therefrom that a deed which contains a recital that it is made in pursuance to a previous contract of sale, takes the case out of the statute, but I am equally convinced that such a deed which contains no such recital, which is the case here, does not, and that notwithstanding it sets forth the terms upon which it is being made."

The Court thus holds that an undelivered deed, notwithstanding it sets forth the terms upon which the contract is made,

⁵ 67 Mass. 409 (1854).

⁶ 16 Minn. 172 (1870); see also *Wier v. Batdorf*, 24 Neb. 83 (1888).

⁷ *Overman and Brown v. Kerr*, 17 Ia. 485 (1864); *Cagger v. Lansing* 43 N. Y. 550 (1871), reversing 57 Barb. 421; *Thomas v. Sowards*, 25 Wis. 631 (1870), but see *Campbell v. Thomas*, 42 Wis. 437 (1877); *Popp v. Swanke*, 68 Wis. 364, at p. 370 (1887); *Freeland v. Charnley et al.* 80 Ind. 132 (1881); *Swain v. Burnette*, 89 Cal. 564 (1891); *Day v. Lacasse*, 85 Me. 242 (1892); *Morrow v. Moore*, 98 Me. 373 (1903).

⁸ *Wilson v. Winters*, 108 Tenn. 398 (1902).

⁹ *Newburger v. Adams*, 92 Ky. 26 (1897).

¹⁰ See *Alford v. Wilson*, 95 Ky. 506 (1894).

does not satisfy the statute, unless it contain a recital that it is made in pursuance of a previous contract. The deed in this case did not contain such a recital; and the decision, that the undelivered deed did not satisfy the statute, is undoubtedly correct under the general rule. The qualification however—"unless it contain a recital that it is made in pursuance of a previous contract"—though it is only dictum in the case, may, if it is followed, prevent Kentucky from falling in line with the trend of authority, under which it appears that without qualification an undelivered deed is not a sufficient note or memorandum of a contract for the sale of real estate, to satisfy the statute of frauds.

H. A. L.

WITNESSES—PHYSICIAN'S PRIVILEGE—A recent decision in Wisconsin, *State v. Law*,¹ holds that a statute² requiring that testimony be given in all cases brought under its law regarding abortion³ in effect abrogates the statutory privilege of secrecy accorded to medical practitioners⁴ and renders physicians called in to treat a woman suffering from the effects of an abortion competent to testify in a criminal prosecution against the person charged with having committed the offense.

The case, therefore, is one more decision upon the disputed question as to the extent of the privilege of legal secrecy accorded to communications between a physician and his patient. The privilege itself is of purely statutory origin. Its existence was not recognized by the common law, and the rule laid down by Lord Mansfield in the *Duchess of Kingston's* trial⁵ has never been questioned either in England⁶ or America.⁷ This principle of the common law has, however, been changed by statutes in more than half the jurisdictions in the United States,⁸ on the ground that it was prejudicial to the best interests of society to allow this disclosure of such confidential information. Many of these statutes, however, like the one enacted in Pennsylvania,⁹ expressly limit the privilege to civil cases; although where no such limitation is expressed, the majority of the Courts grant it in criminal cases as

¹ 136 N. W. Rep., 803 (1912).

² St. 1898, Section 4078, amended by Laws 1905, c. 149.

³ St. 1898, Section 4352.

⁴ St. 1898, Section 4075, amended by Laws 1901, c. 322.

⁵ 20 How. St. Tr. 573 (1776), Mansfield, L. C. J. "If a surgeon were voluntarily to reveal these secrets he would be guilty of a breach of honor . . . but to give that information in a Court of justice . . . which he is bound to do, will never be imputed to him as any indiscretion whatever."

⁶ *Russell v. Jackson*, 9 Hare, 387 (1851); also *dicta* by Jessel, M. R. in *Wheeler v. LeMarchant*, L. R. 17 Ch. Div. 675 (1881).

⁷ *Campan v. North*, 39 Mich. 606 (1878); *Steagald v. Steagald*, 22 Tex. App. 464 (1886); *Banigan v. Banigan*, 26 R. I. 454 (1904).

⁸ For a summary of the various Statutes, see Wigmore: Evidence, Vol. IV, Section 2380 and notes.

⁹ Act June 18, 1895, P. L. 195.